In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES AND KIOWA INDIANS, appellants,
v.
JUAN B. MARTINEZ, ADMINISTRATOR OF Julio Martinez, deceased.
} No. 170.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from the Court of Claims in an Indian depredation case brought in that court under the jurisdictional act entitled "An act to provide for the adjudication and payment of certain Indian depredation claims," approved March 3, 1891 (1 Supp. R. S., 2d ed., p. 913). That act provides:

> That all claims existing at the time of the taking effect of this act shall be presented to the court by petition as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred.

The claimant filed his claim in the court below within the statutory time, making the United States and the Ute tribe of Indians defendants. Subsequently, after the expiration of more than three years, he filed an amended petition by which the Kiowa tribe of Indians was substituted for the Ute tribe. The Court of Claims allowed the filing of the amended petition, overruled the defendants' plea in bar, and rendered judgment against the United States and the Kiowa tribe of Indians.

From this judgment the defendants appeal.

It is conceded that at the time when he filed his amended petition he could not have begun a new suit against the Kiowa Indians. It will also be conceded that there is no privity of interest nor any connection whatsoever between the Kiowa Indians and the Ute Indians. The sole question raised by the appeal is whether under the statute the court erred in permitting the Kiowa Indians to be substituted by amendment at a time when an original suit against them would have been barred by the statute.

AMENDMENTS UNDER THE STATUTE OF LIMITATIONS.

It is not permissible to bring in a new party defendant by an amendment after the statute of limitations has run in his favor. It has been held by this court that the substitution of a new party, or the introduction of an additional party as defendant in a suit, is equivalent to the beginning of

a new suit. When new parties are made by amending a bill in equity, it is held that the statute of limitations does not cease to run in their favor until they are cited in. In *Miller* v. *McIntyre* (6 Pet., 61), McLean, J., delivering the opinion of the court, said:

> It is insisted that the amended bill filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently that the statute can not bar, as its limitation had not then run.
>
> Until the defendants were made parties to the bill, the suit can not be considered as having been commenced as against them. It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice and where a final decree in the case would not have prejudiced their rights.

This case was cited with approval by Chief Justice Marshall in *Sicard's Lessee* v. *Davis* (6 Pet., 124). So, in a suit to enforce a mechanic's lien, where a new party defendant was brought into the case by an amendment to the petition after the expiration of the six months' limitation prescribed for the bringing of such suits, the supreme court of Illinois, in reversing the judgment of the court below, said:

> Appellant was brought into the case, after the lapse of more than two years, by an amendment to the petition. So far, then,

as he is concerned, there was no suit pending against him within the six months, but only from the time of the amendment. This can have no relation back to the time of commencing the suit against the original parties * * *. *Bringing him in at a time subsequent is in effect commencing a new suit against him at that time.*

Crowl v. *Nagle*, 86 Ill., 437.

See also to the same effect *Dunphy* v. *Riddle*, 86 Ill., 22; *Clark* v. *Manning*, 95 Ill., 508.

SUPPOSED HARDSHIPS DO NOT AFFECT LIMITATION.

Neither can a supposed hardship upon the claimant in this case affect the decision in regard to the running of the limitation provided by the statute.

Statutes of limitation are arbitrary in all their aspects and operations. Unless the statute makes an exception there can be none, however great may be the hardships that ensue. (*Jones* v. *Lemon*, 26 W. Va., 629; *Kendall* v. *United States*, 107 U. S., 123.) "The general rule is that the language of the act must prevail, and no reasons based upon apparent inconvenience or hardship can justify a departure from it." (Bradley, J., in *Amy* v. *Watertown*, 130 U. S., 320.)

The statutory provision which applies in this case is not identical with the ordinary statutes of limitation, but in this respect is stronger than such statutes, inasmuch as its prescription does not merely apply to the right of action on the claim, but declares the demand barred; so that the court

will interpose the statute in bar of a suit whether or not it is pleaded by counsel for the defendants. (*Kendall* v. *United States*, 14 C. Cls. R., 122.) But in other respects the proviso in the statute is in the same nature as the ordinary statute of limitation (although it begins to run from a time fixed by its own terms instead of the date when the demand accrued, and no disability of the claimant will suspend its operation against him) and is subject to the same rules of construction and application; and it follows from the decisions cited above that no argument which applies merely to the hardship, or supposed hardship, upon the claimant, which may be caused by the statute, can affect its application. It is said in the *Kendall case* (*supra*) that when claimants come to the Court of Claims—

> They come, subject, of course, to all the statutory terms prescribed by the law-making department of the Government, and there is no power in this court to admit them here as suitors on any other terms, nor to go beyond the line of jurisdiction laid down for it by the law, nor to remove or disregard any barrier which the legislature has erected, nor to interpose any that that body has not prescribed.

If, then, the substitution of a new party defendant by amendment is equivalent to the beginning of a new action against him, and if this is forbidden by the statute irrespective of any hardships which may ensue, authority for the judgment of

the court below must be found in some provision of the jurisdictional act which would except this from the general rule. Unfortunately, the court below did not write an opinion in this case and did not refer to any previous decision in overruling the defendants' plea. Presumably, however, the action was taken on the authority of *Duran's case.* (31 C. Cls. R., 353.) This is a case which, while differing in two respects, both of which are accorded some importance by the court in its opinion, raises the same general question that is involved in the case at bar.

THE DURAN CASE DISTINGUISHED.

The Duran case is distinguished from this in the fact that the joinder of the wrong tribe of Indians in that case was apparently an error on the part of the claimant's attorney, since the declaration and evidence in the same case, previously filed in the Interior Department, and available to the attorney, showed the right defendants throughout. Such mistakes the Court of Claims is disposed to correct wherever it is within its power; and the opinion cites the *Cowan Infants' case* (5 C. Cls. R., 107) and the *Thomas case* (15 C. Cls. R., 335.) In the case at bar there is no indication that a mere clerical mistake has been made, either by the claimant or his attorney. It is simply a case where a civil action has been commenced against a party who is shown by the evidence to have been innocent of any wrong to the plaintiff, and where there

is no action commenced against the real party implicated by the evidence.

Again, in the Duran case much was made by the court of the fact that the objection was not raised in time by the defendants, since if a plea of nonjoinder or misjoinder had been filed at the commencement of the litigation the claimant could have discontinued and brought an action against the right defendants. (Opinion in Duran case, 31 C. Cls. R., 355–356.) Whatever the merit of that argument in the Duran case, where evidence had been taken and filed in the Interior Department before the commencement of the action in the Court of Claims, it can have no possible application here. This is not a suit on contract where the United States as one defendant is presumed to know whether the right parties are joined as codefendants; it is primarily a suit against an Indian tribe for a certain act alleged to have been committed by some of its members in a remote region some eighteen years before the action was brought. The United States is joined only as guarantor, and the guarantee is one which arises, not out of complicity in the wrongdoing, nor out of contract with relation to the specific subject-matter of this suit, but out of a general law, indefinite in its application to individual instances, and applying equally to some hundreds of tribes and to acts committed throughout a long series of years. From the very nature of the case, it is one in which the facts were peculiarly within the

knowledge of the claimant; and the United States, having no actual knowledge of the occurrence, can not be charged with such knowledge. It would be absurd to say in this case that the defendants, the United States, were required to set up a plea of misjoinder "at the threshold of the litigation," or that the defendant Indians, the Ute tribe, did not fully meet the requirements of the case by pleading the general issue. Besides, the defense under the statute is made by the Kiowa Indians and not by the United States, and neither the Kiowa tribe nor the United States were ever apprised of the fact that the claimant would attempt recovery against that tribe until his evidence was filed; and this was long after the expiration of the time within which new actions could be commenced.

There is therefore no laches on the part of the defendants in the court below and no question of correcting a mere clerical mistake, apparent on the face of the papers; and in these respects this case is distinguished from the Duran case and should not be ruled by that decision.

It is to be presumed, however, in the absence of an opinion, that the court decided this case upon the remaining arguments of the Duran case; and these will now be considered.

I. THAT THE OBJECTION IS TECHNICAL.

The court calls the defense a technical one, because the Attorney-General, who is by the statute charged with the duty of defending the Indians as well as the United States in all cases,

was in court from the beginning of the litigation. It is also stated in the opinion that the Indians who are sought to be charged (in this case, the Kiowa tribe) have lost nothing by the delay, since their defense has been as effectively looked after as if they had been parties on the record. However gratifying this testimonial may be to the Attorney-General, it is conceivable that it might not meet with the full indorsement of the Kiowa Indian tribe, since they, as well as the Utes (who were charged in the original petition), had for many years employed an attorney to represent them in the defense of similar suits. What right has the court to say that the Indians who are to be charged with the judgment are not entitled to be made parties to the record and to be given an opportunity to defend by their own attorney, within the statutory time, because of an assumption that their interests would be effectively guarded by someone else? And the statement that "they have lost nothing by the delay," even if it be conceded to be true, would not be an answer to a plea of the statute of limitations in any other jurisdiction. This defense is always technical, but is not therefore any the less conclusive.

II. WHETHER THE TRIBE IS A NECESSARY PARTY TO THE SUIT.

The court further says that the statute does not *in terms* make the Indian tribe a necessary defendant, and that the court must gather by implication the statutory intent that such tribe is a

necessary party (id., 357). Owing to the somewhat ambiguous language of the statute this is true, but it is also true that when the statute is read as a whole that implication is a necessary and binding one; for no judgment could be rendered against a person or a corporation or a body politic not a party to the suit. However the party may be brought in, by whatever process the court may acquire jurisdiction, at whatever time the connection with the suit may begin, it is essential that all the parties be properly before the court before judgment can be rendered. This proposition is not negatived by the decision in *Graham* v. *United States* (30 C. Cls. R., 318), since there it was held that the petition charging the Sioux Nation of Indians was sufficient to bring into court all the bands constituting that nation, including the Minneconjou band, which was shown to have committed the depredation.

A complete answer to the proposition thus tentatively advanced as an argument in the earlier portion of the opinion is found in the holding at the close of the same opinion—"that the (Navajo) tribe *is* a necessary party to the case" (id., 361); and also in the decision of the same court in the case of *Woolverton* v. *The Nez Perces* (29 C. Cls. R., 107). In that case the petition charged the Nez Perce tribe of Indians. The proof showed that the depredation was committed by Joseph's band of Nez Perces, and that this band had long been separated from the Nez Perce tribe and constituted

an independent band. The petition was dismissed, and Nott, Ch. J., delivering the opinion of the court, said:

> The defendant Indians are not liable, because they did not commit the depredation. The United States are not liable, because the Indians who committed the depredation, and who were perfectly well known, have not been made parties to the suit. It is a fatal nonjoinder of the responsible party.

III. THE WORDS, "AS NEAR AS MAY BE."

Section 3 of the statute provides:

> That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, *the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be*, the property lost or destroyed and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved.

It is upon the words "as near as may be," in the above section, that the appellee's whole contention must finally rest. If they authorize a claimant to bring suit within the statutory time against the United States as guarantor for some tribe of Indians not disclosed by the pleadings, and confer upon the court jurisdiction to bring in

whatever tribe or tribes may be shown by the evidence to be responsible, and to make such tribe or tribes a primary defendant notwithstanding the limitation of the statute has run in their favor, then the court below was authorized to allow the amendment. But it is respectfully insisted by the appellants that such is not the effect of the phrase quoted.

In the first place, such a power of citing in defendants after the statute has run in their favor, being an extraordinary power and in contravention of the ordinary rules of law, its grant must be clearly and unequivocally expressed. It must not be a matter of inference. The Kiowa Indian tribe in this case claims the right to plead the bar of the statute; and if it is argued that they are excepted from the operation of the statute, while they are bound by the other provisions of the same statute, they are entitled to clear proof that such was the intention of Congress.

Now, when the statute is read as a whole the language quoted does not bear any such construction. The statute provides that service shall be made upon the Attorney-General and that it shall be his duty to defend the Indians as well as the United States (sec. 4); and that the Indians may appear and defend by an attorney employed by themselves with the approval of the Commissioner of Indian Affairs (id.); that the court shall render judgment against the United States and against the tribe of Indians committing the wrong when

such can be identified (sec. 5); that the judgment so rendered shall be paid from some one of the various funds or annuities due to the defendant Indians (sec. 6); that where no such funds are available the judgment shall be paid from the Treasury of the United States and "shall remain a charge against such tribe and shall be deducted from any annuity fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe" (id.); and, finally, that the tribe of Indians, as well as other parties interested in the proceedings, "shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases" (sec. 10).

It is apparent that the Indian tribes have thrust upon them by this statute all the responsibilities of defendants. They may appear and defend by their own attorney if they choose, and may appeal to the Supreme Court; judgment is to be rendered against them wherever a case is proven; such judgment is to be paid out of their funds, and if they have no funds available for that purpose, the judgment is to remain a charge against them, to be deducted from future annuities.

Against all these substantive provisions, which necessarily imply the rights and duties and responsibilities of defendants, there is only the general language of a section which purports to be merely descriptive of the petition, which seems to be intended to aid the claimant in framing his

petition, and which begins with advice and conditions concerning the literary style of the petition. It does not seem reasonable, nor in consonance with sound rules of interpretation, to hold that such language, in such context, is sufficient to relieve the claimant from the necessity of proceeding against the responsible defendants, as defined by all other portions of the statute, within the limit of time arbitrarily fixed by the second section.

But if these words have the significance assigned to them by the argument for the appellee, then, considering that they are in conflict with the necessary implication from nearly every other provision of the statute concerning the Indians, and that they contravene the ordinary rules of law concerning the rights of necessary parties to an action, the claimant should be held strictly to the performance of the condition which they impose. They can not be important as against the Indian defendants and unimportant in the claimant's favor. He was in possession of the facts regarding his claim. He knew the witnesses by whom he would prove it. He had three years in which to file his petition. Where is it shown that he named the Indians "as near as may be?" And if that be not shown, how can he claim the benefit of the supposed operation of the clause which requires it?

It is not necessary to go to such lengths in order to find the meaning of the words "as near as may be." In the first place, it is a matter of serious

doubt whether they were ever intended to apply in any measure to the "tribe or tribes" of Indians. In this connection, the words just preceding these are significant. The statute says the petition shall set forth "*the persons, classes of persons*, tribe or tribes, or band of Indians," etc., as near as may be. Again, in section 5 it is provided that the court shall determine if possible the tribe of Indians, *or other persons*, by whom the wrong was committed. Who were "the other persons" referred to in these two sections? Elsewhere the act is silent in regard to them. The jurisdiction which it confers relates only to claims for depredations committed by Indians. No power is given the court to render judgment for wrongs committed by any other persons. Yet here is language which undoubtedly refers to possible depredations by other persons and, apparently, by other persons whose identification is difficult or uncertain. The explanation is to be found in the legislative history of the act, to which the court may look when ambiguities or contradictions exist in a statute. (*Blake* v. *National Banks*, 23 Wall., 307.) The bill which afterwards became a law, as originally drafted, was reciprocal in its provision for the adjudication of claims by Indians against whites as well as those by whites against Indians. In its earlier stages, and as reported by committees in both Houses of Congress, the bill provided for recovery against the United States for the value of property illegally taken from an

Indian or an Indian tribe by white persons. Before the final passage of the act it was amended by striking out the provision for the payment of such claims, in view of the fact that they were already provided for in sections 2154 and 2155 of the Revised Statutes; but in the revision of the bill some phrases were inadvertently retained, which were properly applicable only to claims made by Indians (Cong. Record, vol. 22, pp. 1395, 2910, 3234). These words are mere surplusage, and it is impossible that any effect be given them. Now, it can readily be seen that, since it would be much easier for a white man to identify the tribe of Indians who committed the depredation upon his property than for an Indian to identify the individual white man or men who had wronged him, the language of section 3, which requires such identification "as near as may be," is far more likely to have been intended to apply to the latter class of cases. When the statute is read in the light of this legislative history, of which it bears upon its face such unmistakable marks, it can not be said that the words in question have the meaning claimed for them by the appellee.

Even without this explanation of the presence of the words in section 3, however, full application can be given to the phrase, and has been given in a prior decision of this court and of the Court of Claims. It is conceivable that a depredation may be committed by Indians whom it is impossible to identify as belonging to any tribe; and in such a

case it is held, in the case of *Gorham* v. *The United States* (29 C. Cls. R., 97; 165 U. S., 316), that the claimant is entitled to recover against the United States alone. In that case, although the claimant charged the Comanche and Kiowa Indians and thus satisfied the requirement of naming the tribe of Indians "as near as may be," he was unable to prove that the depredation was committed by Indians of either tribe. In such case it was held that he was entitled to recover against the United States alone.

The appellants' theory of the proper construction of this clause of the statute, assuming that it was intended to apply to claims against Indians, is that the claimant is bound to bring into court, either at the time of filing his petition or by amendment before the expiration of the three years' limitation, the tribe or tribes of Indians responsible for the depredation wherever it is possible with all the means at his command to fix the identity of such tribe or tribes. If he should fail to do this, and the testimony should fail to disclose the tribe, while showing that a depredation was committed by some Indians, then the court may render judgment in favor of the claimant and against the United States, as in the Gorham case. But if the testimony presented by the claimant discloses that the depredation was committed by a tribe of Indians not charged by the claimant, it shows at the same time that he has not done his utmost to bring into court the proper parties defendant; for the

information at his command must have been or should have been equal to that produced in support of his claim. In this event it is either his fault or his misfortune that the statutory bar prevents him from bringing a new suit against the proper parties; but, as in other cases of limitation, the operation of the statute is arbitrary, and the Court of Claims has no power to relieve the claimant from its consequences.

IV. THE FIFTH SECTION—THE FORM OF THE JUDGMENT.

The fifth section of the statute provides:

> That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified.

The court argues in the Duran opinion that this clause is mandatory and means that judgment must be rendered against the tribe of Indians responsible for the depredations whether it is a party to the suit or not; and that, by necessary implication, it invests the court with power to bring in the responsible defendants at any time before judgment, since judgment can not be rendered against one not a party to the suit. And the court asks, "If the tribe can not be brought in,

how can judgment be rendered against it?" How, indeed? And how would this argument read if advanced in any other case where the statute of limitations was under discussion? The obvious answer is that judgment can not be rendered against it; and that the requirement, which the court regards as mandatory, applies only to cases where the parties are properly before the court and subject to its jurisdiction; where the claimant is a citizen of the United States; where the depredation was committed by Indians within the territorial limits of the United States and within the time limit specified by the statute; where the claimant was not a trespasser upon the Indian lands, and where the fact of the depredation has been proven to the satisfaction of the court. And of all these requirements in the statute, the first and most important is that of jurisdiction of the parties. This section relates merely to the form of the judgment, as section 3 relates to the form of the petition; and the jurisdictional requirements must be sought elsewhere.

The alternative implication in this section, as in section 3, of the existence of cases where the Indians can not be identified is fully explained and applied by the decision in the *Gorham case* (*supra*).

But one other reason is advanced by the court in the Duran opinion. That is the statement that "it is manifest that a claim is filed so as not to be barred by the statute when the petition is filed,"

and numerous cases are cited in support of that statement. The authorities cited, however, with one exception, relate to cases wherein the United States is the sole defendant, and none of them touches upon the point at issue here.

CONSEQUENCES OF THE DECISION.

Certain consequences which follow the decision of the court below argue against it.

The statute provides that it is the right of the Indians to appear by attorney and defend suits brought against them. This is a substantial and valuable privilege. Not only is it possible that an attorney specially employed to defend suits brought against a single tribe may, by reason of superior experience, information, and leisure, interpose a more effectual defense than the attorneys employed by the Government and charged with the defense of several hundred tribes; but it sometimes happens that the defenses of the tribe and of the United States are inconsistent, or that the former are of such nature that the United States is estopped from pleading them. An instance occurs where the title to land is in dispute between the tribe and the United States. If the claimant was a trespasser upon the Indian lands that fact would be a complete defense to the action; but the Attorney-General can not maintain the title of the tribe to the lands where the United States is asserting an adverse claim.

Various tribes have availed themselves of the right to defend by their own attorneys. In the

case of some tribes, as the Utes and Osages, practically every case in which they were made parties defendant during the term provided by the statute has fallen under the scrutiny of competent attorneys employed solely for the purpose of defending the interests of these tribes. In the case of each tribe named the apparent necessity for the employment of such attorneys is nearly at an end; but if it be held that new suits can be brought against them at any time by the simple process of amendment, the same necessity which has led them to employ attorneys in the past would require them to continue such employment indefinitely. It is unnecessary to point out that this is the very condition which it is the object of statutes of limitation to prevent.

Again, it goes without saying that many claims against the Government are brought by unprincipled men, who do not hesitate to employ illegal methods to establish their claims. It is not an uncommon experience to meet with efforts on the part of the claimants to change, by taking additional testimony, or even by retaking the testimony of the same witness, the name of the tribe by which the depredation was committed, the purpose being to show the commission of the depredation by some tribe in amity with the United States, where the tribe charged in the petition has been found hostile by a decision rendered since the original testimony was taken. Still more numerous are the cases where no testimony has ever been

taken and where the claimant, if so disposed, would have an opportunity to manufacture evidence against a tribe whose jurisdictional status at the time of the depredation was unquestioned. A construction of the statute which permits indefinite amendment as to parties defendant, lends itself to the perpetration of this kind of fraud, which is exceedingly difficult to combat.

JUDGMENT CAN NOT BE RENDERED AGAINST THE UNITED STATES ALONE.

In the argument thus far counsel has appeared for the Kiowa Indians, and the question has been considered as affecting their rights under the statute. The United States has, however, an equal interest in the subject. If the judgment of the Court of Claims be reversed on the ground that there was no authority to bring in the responsible Indians after the running of the statute, there is no suit in court, except that against the Ute Indians; and as it has been shown that they did not commit the depredation, the petition must be dismissed. The United States appears simply as guarantor in all cases; the act of March 3, 1891, did not enlarge its liability in this respect (*Corralitos Company* v. *The United States*, 33 C. Cls. R., 342; s. c., 178 U. S., 280). No judgment can be rendered against the United States alone, except in a case where the Indian tribe has not been identified. If the court shall sustain the contention of the appellant tribe of Indians the case will be in the same atti-

tude as that of *Woolverton* v. *The United States and the Nez Percé Indians* (29 C. Cls. R., 107), where the court said:

> The defendant Indians are not liable, because they did not commit the depredation. The United States are not liable, because the Indians who committed the depredation, and who were perfectly well known, have not been made parties to the suit.

RÉSUMÉ.

Summarized, the contentions of the appellants are—

1. The Indian tribe against which judgment is to be rendered in an Indian depredation case is the primary defendant and a necessary party to the suit, having the right to defend by its own attorneys and the right to appeal to the Supreme Court.

2. If action be not commenced against such primary defendants within three years from the date of the statute, it is beyond the power of the court below to bring them in by amendment.

3. In the act of March 3, 1891, no exception is made by which the Indian tribe is deprived of the privilege of pleading the bar of the statute.

4. No argument based on apparent hardship to the claimant can avail against the operation of the statute.

5. The decision of the court below is contrary to the spirit of statutes of limitation; would compel a tribe which desired to defend its own cases to keep an attorney constantly employed long after

the termination of all suits brought against such tribe within the statutory time, and would lend itself to the perpetration of fraud.

6. The United States, being a guarantor only, can not be held liable where the primary defendants, being known, have not been proceeded against within the statutory time.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

O